

**LETTER OPINION  
2010-L-07**

March 25, 2010

The Honorable Mike Schatz  
State Representative  
400 9th St E  
New England, ND 58647-7528

Dear Representative Schatz:

Thank you for your letter asking whether the State Auditor is vested with the authority to investigate and report on allegations of fraud, waste, abuse, and violations of state or federal law in state agencies and political subdivisions subject to audit by the State Auditor. As further explained below, it is my opinion that the State Auditor does not have general statutory authority to investigate and report on allegations of fraud, waste, abuse, and violations of state or federal law in state agencies and political subdivisions subject to audit by the State Auditor, separate and apart from the auditor's auditing duties. It is my further opinion, however, that state law authorizes the State Auditor to conduct investigations under specific circumstances which could, if necessary, address allegations of fraud, waste, abuse, and violations of federal or state law. It is my further opinion that the State Auditor may examine and report on allegations of fraud, waste, abuse, and violations of state or federal law committed at state agencies and political subdivisions as part of an audit authorized or required under N.D.C.C. ch. 54-10 or other laws.

**ANALYSIS**

The State Auditor is a constitutionally designated, elected official whose powers and duties are prescribed by law.<sup>1</sup> In relevant part, the primary powers and duties of the State Auditor are to: (1) "perform[ ] the postaudit of all financial transactions of the state government, detecting and reporting any defaults, and determining that expenditures have been made in accordance with law and appropriation acts," and (2) "[p]erform or provide for the audit of the general purpose financial statements and a review of the material included in the comprehensive annual financial report of the state and perform or provide for the audits and reviews of state agencies."<sup>2</sup> In addition to regular biennial audits and other audits required by statute, the head of a state agency or the governing board of a

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<sup>1</sup> N.D. Const. art V, § 2.

<sup>2</sup> N.D.C.C. § 54-10-01(1) and (2).

political subdivision subject to audit may request an audit if the agency or board has reason to believe there is irregularity in handling funds or embezzlement has occurred.<sup>3</sup>

You ask whether state law<sup>4</sup> vests the State Auditor with the authority to investigate and report on allegations of fraud, waste, abuse, and violations of federal law at state agencies and political subdivisions. The general authority to conduct investigations, which you refer to in your question, does not appear as stated within state law. But there are at least two instances where state law provides the State Auditor with specific, as opposed to general, statutory authority to conduct an investigation. Under N.D.C.C. § 26.1-21-12, if a public employee or public official defaults or creates a liability against the bonding fund, the Insurance Commissioner is required to notify the State Auditor who is then required to conduct an investigation “or cause to be investigated” the relevant accounts. Under N.D.C.C. § 53-06.2-12, the Racing Commission may request that the State Auditor audit “and investigate” the operations of a licensee.

Although the State Auditor does not have general statutory authority under N.D.C.C. ch. 54-10 to conduct investigations that are separate and apart from “post audits” and “audits,” an additional question is whether the authority necessary to carry out the Auditor’s specific statutory authority should be implied<sup>5</sup> based upon the Auditor’s statutory authority to conduct post audits and audits.<sup>6</sup>

The primary goal of statutory construction is to determine legislative intent.<sup>7</sup> Words used in a statute are given their plain, ordinary, and commonly understood meaning unless

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<sup>3</sup> N.D.C.C. § 54-10-16; see also N.D.C.C. § 54-10-15 (State Auditor may conduct an audit of a political subdivision upon the request of the Governor or the Legislative Audit and Fiscal Review Committee).

<sup>4</sup> You reference legislation from the 2007 legislative session, wherein the State Auditor supported legislation to give his office express authority to investigate and report on allegations of fraud, waste, abuse, and violations of state or federal law at state agencies and political subdivisions. See S.B. 2054, 2007 N.D. Leg., § 1. The bill was not enacted. See 2007 Senate Journal at 41 (Jan. 8, 2007).

<sup>5</sup> Am. Fed’n of State, County, and Mun. Employees v. Olson, 338 N.W.2d 97, 100 (N.D. 1983); see also N.D.A.G. 2000-L-62.

<sup>6</sup> Although N.D.C.C. § 54-10-22 requires state agencies and other public entities subject to examination by the state auditor to afford all reasonable facilities for the investigations provided for in this title, there is no further authorization within Title 54 of the Century Code or N.D.C.C. ch. 54-10, for the State Auditor to conduct investigations. The State Auditor is not expressly authorized under N.D.C.C. ch. 54-10 to “investigate and report on allegations of fraud, waste, abuse, and violations of federal law at state agencies and political subdivisions,” as phrased by you in your question.

<sup>7</sup> Estate of Elken, 735 N.W.2d 842, 845 (N.D. 2007).

defined by statute or unless a contrary intention plainly appears.<sup>8</sup> The words “post audit” and “audit” are neither defined nor explained within the Century Code. Black’s Law Dictionary defines the word “post audit” as “[a]n audit of funds spent on a completed capital project, the purpose being to assess the efficiency with which the funds were spent and to compare expected cash-flow estimates with actual cash flows.”<sup>9</sup> And, the word “audit” is defined as a “formal examination of an individual’s or organization’s accounting records, financial situation, or compliance with some other set of standards.”<sup>10</sup>

The definition of the word “investigate” is similar to the words “post audit” and “audit;” it means “[t]o inquire into (a matter) systematically; to make (a suspect) the subject of a criminal inquiry; [t]o make an official inquiry.”<sup>11</sup> Thus, based upon the definition it appears that a “post audit” or “audit” could arguably be construed as an investigation, or vice versa.

“Technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law, or as are defined by statute, must be construed according to such peculiar and appropriate meaning or definition.”<sup>12</sup> As explained below, the word “investigate,” in the context of the State Auditor, appears to have a unique or different meaning than the words “post audit” or “audit.” This is substantiated by the generally accepted auditing standards used by the State Auditor.

In conducting an audit, the State Auditor follows the generally accepted auditing standards<sup>13</sup> which are contained in a publication entitled “Government Auditing Standards” published by the Comptroller General of the United States. The Government Auditing Standards provide that as part of an audit, auditors should report (1) significant deficiencies in internal control, (2) all instances of fraud and illegal acts,<sup>14</sup> and (3) violations of provisions of contracts or grant agreements and abuse that could have a material effect on the financial statements.<sup>15</sup> The State Auditor performs both financial and performance audits. Financial audits provide an independent assessment about whether an entity’s reported financial condition, results, and use of resources are presented fairly in

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<sup>8</sup> N.D.C.C. § 1-02-02.

<sup>9</sup> Black’s Law Dictionary 141 (8th ed. 2004).

<sup>10</sup> Black’s Law Dictionary 140 (8th ed. 2004).

<sup>11</sup> Black’s Law Dictionary 844 (8th ed. 2004).

<sup>12</sup> N.D.C.C. § 1-02-03.

<sup>13</sup> The State Auditor’s Office informed a member of my staff that it follows the auditing standards set forth in U.S. Gov’t Accountability Office, GAO-07-731G, Gov’t Auditing Standards (2007).

<sup>14</sup> The standards indicate that “[w]hether a particular act is, in fact, illegal may have to await final determination by a court of law or other adjudicative body. Disclosing matters that have led auditors to conclude that an illegal act is likely to have occurred is not a final determination of illegality.” Gov’t Auditing Standards, §§ 4.28 n.60 and 4.29 (2007).

<sup>15</sup> Gov’t Auditing Standards, § 5.10 (2007).

accordance with recognized criteria.<sup>16</sup> "Performance audits" are engagements that provide state agencies with objective analysis of programs so that management can use the information to improve program performance and operations.<sup>17</sup>

Under the Government Auditing Standards, "[i]f specific information comes to the auditors' attention that provides evidence concerning the existence of possible illegal acts that could have a material indirect effect on the financial statements, the auditors should apply audit procedures specifically directed to ascertaining whether an illegal act has occurred."<sup>18</sup> Although this type of examination could easily be called an "investigation," the auditing standards further advise:

Avoiding interference with investigations or legal proceedings is important in pursuing indications of fraud, illegal acts, violations of provisions of contracts or grant agreements, or abuse. Laws, regulations, or policies might require auditors to report indications of certain types of fraud, illegal acts, violations of provisions of contracts or grant agreements, or abuse to law enforcement or investigatory authorities before performing additional audit procedures.<sup>19</sup>

This guidance suggests that an "investigation" of fraud, illegal acts, and abuse, is an activity distinct from the performance of audit procedures by an auditor. It is notable that illegal acts of importance to an audit are "violations of laws or government regulations that have a direct and material effect on the determination of financial statement amounts . . . [and that] the auditor considers such laws or regulations from the perspective of their known relation to audit objectives derived from financial statement assertions rather than from the perspective of legality per se."<sup>20</sup>

More importantly, the appendix to the Government Auditing Standards provides that a government auditor could conduct "investigations of alleged fraud, violation of contract provisions or grant agreements, or abuse," but the appendix describes this service as a "non-audit service" that could be added by state legislatures.<sup>21</sup> As explained above, the Legislature has done this in N.D.C.C. §§ 26.1-21-12 and 53-06.2-12. It is worth noting that

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<sup>16</sup> Gov't Auditing Standards, § 1.22 (2007). Reporting on financial audits performed in accordance with generally accepted government auditing standards also includes reports on internal control and compliance with laws and regulations.

<sup>17</sup> Gov't Auditing Standards, § 1.25 (2007). The State Auditor conducts performance audits in accordance with generally accepted government auditing standards.

<sup>18</sup> Gov't Auditing Standards, § 4.28 (2007).

<sup>19</sup> Gov't Auditing Standards, § 4.29 (2007).

<sup>20</sup> Gov't Auditing Standards, § 4.28, n.59 (2007) (emphasis added).

<sup>21</sup> Gov't Auditing Standards, Appendix 1 Supplemental Guidance § A3.03(k)(1).

other states and the federal government have also enacted separate statutes to authorize investigations of fraud and abuse separate and apart from audits.<sup>22</sup>

Although the definitions of the words “post audit,” “audit,” and “investigate” appear to be somewhat similar, their usage within the law and the Government Auditing Standards support the conclusion that an auditor’s “investigation” is different from an auditor’s “post audit” or “audit.” Therefore, it is my opinion that the State Auditor has neither the general statutory authority nor implied authority to investigate allegations of fraud, waste, abuse, and violations of state or federal law at state agencies and political subdivisions. It is my further opinion, however, that state law authorizes the State Auditor to conduct investigations under specific circumstances separate and apart from audits and, during the course of such an investigation, the State Auditor could examine and report on allegations of fraud, waste, abuse, and violations of federal or state law. It is my further opinion that even if the State Auditor does not have the general statutory authority to investigate and report on allegations of fraud, waste, abuse, and violations of state or federal law at state agencies and political subdivisions, the Auditor has the authority to examine and report on such allegations during the course of a “post audit” and “audit.”

Sincerely,

Wayne Stenehjem  
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.<sup>23</sup>

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<sup>22</sup> See, e.g., Fla. Stat. Ann. § 20.055(2) (“[t]he Office of Inspector General is hereby established in each state agency”) and (6) (“[i]n carrying out the investigative duties and responsibilities specified in this section, each inspector general shall initiate, conduct, supervise, and coordinate investigations designed to detect, deter, prevent, and eradicate fraud, waste, mismanagement, misconduct, and other abuses in state government”); N.Y. Exec. Law § 53(1) (Mckinney 2009) (the state inspector general has the duty and responsibility to “receive and investigate complaints . . . concerning allegations of corruption, fraud, criminal activity, conflicts of interest or abuse in any covered agency”); see also Ohio Rev. Code Ann. § 121.42(B); N.C. Gen. Stat. Ann. § 147-64.6(c)(16); 5 U.S.C. app. §§ 2, 4.

<sup>23</sup> See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).